

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

In re:

DENNIS RAY JOHNSON, II,

Debtor.

Case No. 16-30227
Chapter 11

**PROTECTIVE OBJECTION OF ZACHARY B. BURKONS, AS RECEIVER, TO
(I) MOTION OF DENNIS RAY JOHNSON, II, TO TREAT TRUSTEE'S MOTION TO
COMPROMISE AS A SALE MOTION UNDER 11 U.S.C. §363 AND
(II) UPSET BID OF DENNIS RAY JOHNSON, II, FOR SALE OF CIVIL ACTION**

Zachary B. Burkons, as Receiver (“**Burkons**”), by counsel, hereby objects (this “**Objection**”) to (i) the Motion of Dennis Ray Johnson, II, to Treat Trustee’s Motion to Compromise as a Sale Motion Under 11 U.S.C. § 363 [Doc. 1105] (the “**Motion**”) and (ii) the Upset Bid of Dennis Ray Johnson, II, for Sale of Civil Action [Doc. 1107] (the “**Upset Bid**,” together with the Motion, the “**Johnson Litigation Filings**”). In support of this Objection, Burkons states as follows:

Background

1. On or about November 24, 2015, Peoples Bank, National Association (“**Peoples Bank**”) filed an action in the Circuit Court of Cabell County, West Virginia (the “**State Court**”), which included a request for the appointment of a receiver with respect to the Debtor and certain of his entities. In January 2016, Peoples Bank specifically moved in the State Court for the appointment of a receiver.

2. On May 9, 2016, Dennis Ray Johnson, II (the “**Debtor**”) filed a voluntary case under chapter 11 of title 11, 11 U.S.C. §§ 101, *et seq.* (the “**Bankruptcy Code**”). [Doc. 1].

3. On or about August 16 or 18, 2016, the State Court entered an order that appointed Burkons as a successor receiver for those entities.

4. The Debtor operated as a debtor-in-possession until November 7, 2016.

5. On November 7, 2016, this Court appointed Thomas H. Fluharty as the Chapter 11 Trustee (the “**Trustee**”) of the bankruptcy estate of the Debtor. [Doc. 169].

6. Also on November 7, 2016, this Court administratively consolidated this case with the bankruptcy cases of other entities related to the Debtor. [Doc. 170].

7. On October 26, 2017, the Trustee filed an action in the United States District Court for the Southern District of West Virginia (the “**District Court**”), case number 16-cv-9874, styled *Thomas H. Fluharty, Trustee v. Peoples Bank, NA, et al.* (the “**District Court Case**”). [Doc. 1, Case 17-cv-4220].

8. The District Court Case asserted claims against a variety of parties, including Burkons, for actions arising out of Peoples Bank’s loans to the Debtor and his entities, collection activity taken by Peoples Bank, and the actions of Burkons as a State-Court-appointed receiver. [Doc. 1, Case 17-cv-4220].

9. On April 24, 2018, the District Court entered an order dismissing Burkons from the District Court Case, finding that the Trustee had failed to obtain permission from the State Court to file an action against Burkons, and that the District Court lacked subject matter jurisdiction as a result. [Doc. 87, Case 17-cv-4220].

10. On May 30, 2018, after it became apparent to the Trustee that the Debtor had engaged in misconduct and made misrepresentations that resulted in the District Court Case lacking as much merit as the Trustee had originally believed, the Trustee filed his motion in this

Court to compromise the estate claims that were the subject of the District Court Case. *See* [Doc. 1040].

11. The Trustee's motion was withdrawn on June 14, 2018. [Doc. 1046].

12. However, on July 3, 2018, the Trustee filed a similar motion to compromise the estate's claims in the District Court Case. [Doc. 1084].

13. On August 3, 2018, the Debtor filed his Johnson Litigation Filings, asking essentially to take over the District Court Case.

Objection

14. To the extent the Debtor is asking this Court to permit the Debtor to take over the District Court Case and revive or renew the action or claims against Burkons, Burkons objects.

15. The District Court has already entered an order finding that it lacks subject matter jurisdiction over Burkons.

16. Burkons is no longer a party to the District Court Case, and is not a proper defendant in the District Court Case.

17. Accordingly, no matter what happens in connection with this Court's disposition of the Johnson Litigation Filings, Burkons objects to any relief that would contravene the District Court's order dismissing Burkons or that would otherwise permit the Debtor to name Burkons in the District Court case should the Debtor obtain the relief requested in the Motion.

WHEREFORE, for the reasons set forth above, in the event the Motion is granted and the Upset Bid is accepted, Burkons respectfully requests that this Court enter an order (a) recognizing the Burkons Dismissal and providing that the Litigation be reinstated without Burkons as a defendant, and (b) granting such other and further relief as is just and proper.

ZACHARY B. BURKONS, AS
RECEIVER,

By Counsel

/s/ Daniel J. Cohn
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DENNIS RAY JOHNSON, II,

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Debtor-in-Possession.

CERTIFICATE OF SERVICE

I, Daniel J. Cohn, do hereby certify that I served the foregoing **Protective Objection of Zachary B. Burkons, as Receiver, to (I) Motion of Dennis Ray Johnson, II, to Treat Trustee's Motion to Compromise as a Sale Motion Under 11 U.S.C. §363 and (II) Upset Bid of Dennis Ray Johnson, II, for Sale of Civil Action** by electronic transmission to all persons registered to receive electronic notices in this case by means of the Court's CM/ECF noticing system, and, where indicated by a mailing address below, by first class United States Mail, postage pre-paid, and properly addressed, all on August 27, 2018.

Appalachian Land Company
PO Box 279
Pikeville, KY 41502-0279

MVB Bank, Inc.
Attn: Louis Argento
400 Washington Street, East
Charleston, WV 25301-1509

David Wright
Richard A. Getty, Esquire
Getty Law Group, PLLC
1900 Lexington Financial Center
250 West Main Street
Lexington, KY 40507-1714

Berkeley Energy Corporation
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Offut Nord Burchett, PLLC
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Dennis R. Johnson, Sr.
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BrickStreet Mutual Insurance
Company
400 Quarrier Street
Charleston, WV 25301-2010

Prater Creek Coal Corporation
PO Box 279
Pikeville, KY 41502-0279

Department of Environmental
Protection
(DEP) & DNR of KY
3140 South Lake Drive
Prestonsburg, KY 41653-1411

Case Dock, LLC 201 Raven Rock Fork Road Louisa, KY 41230	Roadside Processing Inc. PO Box 279 Pikeville, KY 41502-0279	Department of Environmental Protection (DEP) & DNR of WV 1101 George Kostas Drive Logan, WV 25601-3483
Caterpillar Financial Services Corporation c/o Brandy M. Rapp, Esq. Whiteford, Taylor & Preston LLP 114 Market Street, Suite 210 Roanoke, VA 24011-1443	The Ohio Valley Bank Attn: Shelly Angel 420 Third Avenue Gallipolis, OH 45631-1135	Department of Treasury Internal Revenue Service PO Box 7346 Philadelphia, PA 19101-7346
City National Bank of West Virginia Attn: Shelby L. Crouse, Vice President 560 4th Street St. Albans, WV 25177-2819	West Virginia State Tax Department Bankruptcy Unit PO Box 766 Charleston, WV 25323-0766	Environmental Protection Agency Region 4 KY Atlanta Federal Center 61 Forsyth Street S.W. Atlanta, GA 30303-8931
Commonwealth of Kentucky Energy and Environ. Office of General Counsel 300 Sower Blvd., Third Floor Frankfort, KY 40601-6571	Whiteford, Taylor & Preston, LLP 500 Grant Street, Suite 2900 Pittsburgh, PA 15219-2502	Federal Loan Servicing PO Box 60610 Harrisburg, PA 17106-0610
Elkview Reclamation & Processing LLC PO Box 1052 Catlettsburg, KY 41129-5052	Ally Financial PO Box 130424 Roseville, MN 55113-0004	First Surety Corporation 179 Summers Street, Suite 307 Charleston, WV 25301-2131
Green Coal, LLC PO Box 1052 Catlettsburg, KY 41129-5052	City National Bank PO Box 7077 Cross Lanes, WV 25356-0077	Hubble Mining Company, LLC c/o Mickey T. Webster, Esquire Wyatt, Tarrant & Combs, LLP 250 West Main Street, Ste 1600 Lexington, KY 40507-1746
Internal Revenue Service PO Box 1040 Stop 2202 Parkersburg, WV 26102	Community Trust Bank Inc. 346 North Mayo Trail Pikesville, KY 41501-1492	DEP Division of Water for KY 200 Fair Oaks Lane, 4th Floor Frankfort, KY 40601-1134
James River Coal Sales, Inc. 901 East Byrd Street, Suite 1600 Richmond, VA 23219-4054	Toyota Motor Credit Corporation c/o Becket and Lee LLP PO Box 3001 Malvern, PA 19355-0701	Zachary B Burkons Rent Due, LLC Keith Building 1621 Euclid Avenue, Suite 408 Cleveland, OH 44115-2117

Janet Griffiths c/o Tracy D. Frye, Esquire Frye Law Offices 404 Ferry Street PO Box 411 Russell, KY 41169-0411	Terex Financial Services 200 Nyala Farm Road Westport, CT 06880	Toyota Financial PO Box 5855 Carol Stream, IL 60197-5855
Kentucky Department of Revenue Frankfort, KY 40619-0008	Timothy P. Rosinsky, Esquire 641 6th Street Huntington, WV 25701-2123	United Bank PO Box 2373 Charleston, WV 25328-2373
Mark Pinson 101 Ridgewood Road Huntington, WV 25701-4866	WV State Tax Department PO Box 3694 Charleston, WV 25336-3694	Wells Fargo 420 Montgomery Street San Francisco, CA 94101-1298
McGillycuddy's Inc. c/o Brian D. Morrison, Esquire Bailey & Wyant, PLLC PO Box 3710 Charleston, WV 25337-3710	Yamaha Motor Finance Corp. 3362 Momentum Place Chicago, IL 60689-0001	J. Daniel Vorsteg Whiteford Taylor Preston 7 Saint Paul Street Baltimore, MD 21202-1697
Mercuria Energy Trading c/o Warren J. Hoffman, Esquire Frost, Brown & Todd, PLLC Lexington Financial Center 250 West Main Street, Ste 2800 Lexington, KY 40507-1706	S. Taylor Hood 949 Third Avenue, Suite 300 PO Box 2868 Huntington, WV 25728-2868	Stephen L. Thompson Barth & Thompson PO Box 129 Charleston, WV 25321-0129
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/s/ Daniel J. Cohn
Daniel J. Cohn (WVSB #11916)